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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-88

THE M/V CYGNUS and LEON SHAFFER GOLNICK,
Petitioners,

vs.

MERRILL-STEVENS DRY DOCK CO.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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MIAMI REVIEW — 371-4853 — 377-3721

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RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The District Court possessed jurisdiction over the subject matter, including jurisdiction to award contracted costs of collection, both as an Admiralty and Maritime cause within the meaning of Rule 9(h) Fed. R. Civ. Pro., as well as in personam, diversity jurisdiction, 28 U.S.C. §1332 by virtue of plaintiff respondent's Florida citizenship and counterclaiming claimant-owner's Maryland citizenship with amount in controversy in excess of $10,000.00 exclusive of interest and costs.

The District Court acquired jurisdiction over the vessel by seizure in an Admiralty and Maritime cause within the meaning of Rule 9(h) to enforce a maritime lien for the agreed consideration for necessaries furnished the vessel as well as over the claimant-owner in personam by virtue of his voluntarily filing a counterclaim.

QUESTIONS PRESENTED

I.

DID THE COURT OF APPEAL'S DISPOSITION OF PETITIONER'S APPEAL WITHOUT ORAL ARGUMENT PURSUANT TO ITS RULE 18 AFTER NOTICE AND WITHOUT OBJECTION BY PETITIONER, AND PER CURIAM AFFIRMANCE UNDER ITS RULE 21 OF FINAL JUDGMENT RENDERED BY DISTRICT COURT PURSUANT TO DETAILED MEMORANDUM OF DECISION, CONSTITUTE AN IMPROPER DEPRIVATION OF PETITIONER'S STATUTORY RIGHT OF APPEAL?

II.

ARE THE REASONABLE COSTS OF COLLECTION, INCLUDING REASONABLE ATTORNEY'S FEES, RECOVERABLE IN REM AND FROM A COUNTERCLAIMING CLAIMANT-OWNER AS A PORTION OF THE AGREED CONSIDERATION FOR NECESSARIES FURNISHED A VESSEL?

III.

DID THE DISTRICT COURT COMMIT REVERSIBLE ERROR IN DENYING PETITIONER'S MOTIONS FOR CONTINUANCE AND FOR NEW TRIAL?

STATEMENT OF THE CASE

This is a cause commenced by plaintiff respondent, Merrill-Stevens Dry Dock Co., to recover for labor and materials furnished the yacht "CYGNUS" pursuant to contract providing for the recovery of costs of collection including reasonable attorney's fees.

Petitioner, Leon Shaffer Golnick, claimed the vessel as owner and secured release of the vessel by posting security in amount agreed upon by the parties. Thereafter Answer was filed which included counterclaim for damages allegedly resulting from improper performance of the work on the part of Plaintiff.

Following pretrial conference, the cause by notice of 29 January 1970 was set for trial on 29 June 1970. Though aware of the trial setting, Petitioner scheduled a sales conference of his company at the same time as the previously ordered trial. He attended the sales conference. He did not attend the trial. Had he attended the trial he could have testified early the second day of the trial well before the time he allegedly was not fit to attend due to illness.

No proffer was ever made of the expected testimony of Bob Sacks employed by Jimmie Diesel. The evidence shows, as was found by the District Court, that difficulty was experienced with the engines even after the work done by Jimmie Diesel. Likewise, the repair item by plaintiff in fact involved authorized work other than initially contemplated and set forth in the work order.

The Court of Appeals, pursuant to its Rule 18, advised counsel after submission of briefs that the cause was being placed on the Summary Calendar for disposition without oral argument. No objection or motion was filed by Petitioner. The Court of Appeals thereafter affirmed, per curiam, the District Court which had entered a detailed Memorandum of Decision constituting its findings of fact and conclusions of law.

After several extensions and the denial of a Petition for Rehearing by the Court of Appeals, the instant Petition was filed in this Court.

ARGUMENT

The petition demonstrates no basis for the exercise of this Court's discretionary jurisdiction. Neither the questions presented nor prejudicial error are demonstrated. Respondent respectfully suggests application of this Court's Rule 56, 1.

I.

DID THE COURT OF APPEAL'S DISPOSITION OF PETITIONER'S APPEAL WITHOUT ORAL ARGUMENT PURSUANT TO ITS RULE 18 AFTER NOTICE AND WITHOUT OBJECTION BY PETITIONER, AND PER CURIAM AFFIRMANCE UNDER ITS RULE 21 OF FINAL JUDGMENT RENDERED BY DISTRICT COURT PURSUANT TO DETAILED MEMORANDUM OF DECISION, CONSTITUTE AN IMPROPER DEPRIVATION OF PETITIONER'S STATUTORY RIGHT OF APPEAL?

The Petitioner has had a full Memorandum of Decision in the District Court affirmed by the Court of Appeals after review of the record and consideration of the briefs. No objection or motion was made by Petitioner in reference to the cause being placed on the Summary Calendar without oral argument.

That Rules 18 and 21 of the Fifth Circuit Court of Appeals, like any other, could be abused has no weight when, as here, they have been properly applied. This Court has upon grant of certiorari both reversed or va-

cated, e.g., **Rogers vs. Paul** (1965) 382 U.S. 198; **Carter vs. West Feliciana Parish School Board** (1970) 396 U.S. 290; and affirmed, e.g., **Brotherhood of Locomotive Engineers vs. Baltimore & Ohio R. Co.** (1963) 372 U.S. 284; **Alabama vs. U. S.** (1962) 371 U.S. 37; without briefing or argument on the merits.

The application of these rules by the Court of Appeals to this case denied Petitioner neither a substantive right of appeal nor due process. It was a medicine befitting an illness from which trial and appellate case loads unnecessarily arise.

II.

ARE THE REASONABLE COSTS OF COLLECTION, INCLUDING REASONABLE ATTORNEY'S FEES, RECOVERABLE IN REM AND FROM A COUNTERCLAIMING CLAIMANT-OWNER AS A PORTION OF THE AGREED CONSIDERATION FOR NECESSARIES FURNISHED A VESSEL?

The contractual undertaking in this case for costs of collection, including reasonable attorney's fees, is a portion of the legal consideration for the labor and materials contracted for and furnished. It is a portion of the indebtedness due Respondent for necessaries which the maritime lien secured.

It has never been seriously questioned, at least since the reported decisions of **The Home** (D.C. W.D., Wash., W.D., 1946) 65 F.Supp. 94; **The John Jay** (D.C. E.D. Pa., 1936) 15 F.Supp. 937; that the parties by contract can

include the costs of foreclosure, including reasonable attorney's fees, as a part of the indebtedness secured by a United States preferred ship mortgage, which like its maritime lien and jurisdiction for foreclosure, is a creature of statute, 46 U.S.C. §§ 922, et seq.; **Detroit Trust Co. vs. The Thomas Barlum** (1934) 293 U.S. 21. It is likewise elementary that interest on the indebtedness for necessaries is encompassed by the maritime lien for the necessaries.

The filing of a cross libel under the former practice and a counterclaim in an in rem proceeding under the present unified rules of practice expose the claimant-owner to judgment in personam.

The leading case under the former practice was, **The Copperfield and The Dea** (5th Cir., 1928) 26 F.2d 175, involving a quasi in rem, foreign attachment, which without more supplied jurisdiction to enter judgment only to the extent of the assets seized. The owner cross libeled and was held thereby subject to a full judgment in personam beyond the value of the property seized.

This holding finds recognition under Rule 13(a) and (b), Fed. R. Civ. Pro. of the unified practice applicable to the cause which provides in material part:

> "**** But the pleader need not state the claim if (1) ***, or (2) the opposing party brought suit upon his claim by attachment or other process by which the Court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13."

Rule 13(b) deals with permissive counterclaims and thus if the pleader elects to assert a permissive counterclaim he cannot elect under the second exception to omit the filing of a compulsory counterclaim.

Thus the result in **The Copperfield and The Dea, supra,** was not forced on an in rem claimant by the unified rules of practice. It clearly applies if, as here, the claimant-owner files a counterclaim and does not elect to avail himself of one of the exceptions of Rule 13 to otherwise mandatory or compulsory counterclaims.

Under both the former and the applicable unified practice, the Court was justified in entering judgment in personam as well as in rem without pleadings by Respondent in personam when all of the issues were tried in a cause participated in by the voluntarily counterclaiming claimant-owner against whom in personam judgment was also entered, e.g.. **Empire Seafoods Inc. vs. Anderson, et al.** (5th Cir., 1968) 398 F.2d 204, 214; **Acme Boat Rentals, Inc. vs. J. Ray McDermott & Co.** (5th Cir., 1970) 424 F.2d 393, 395.

III.

DID THE DISTRICT COURT COMMIT REVERSIBLE ERROR IN DENYING PETITIONER'S MOTIONS FOR CONTINUANCE AND FOR NEW TRIAL?

Elementary is the rule that the granting or denial of a continuance is within the sound discretion of the Trial Judge, and his ruling on such motion will not be disturbed on appeal unless abuse of discretion is shown, e.g., **Ballard**

vs. Nye (5th Cir., 1927) 18 F.2d 98; **City of Coral Gables vs. Hayes** (5th Cir., 1935) 74 F.2d 989, 990; **Connecticut General Life Ins. Co. vs. Breslin** (5th Cir., 1964) 332 F.2d 928, 932.

The Petitioner, though aware of the trial date for many months, thereafter set a sales conference of his advertising company in conflict and eventually became ill.

Petitioner, not an itinerant seaman, with actual, personal knowledge of the trial date, establishes no abuse of discretion. **Davis vs. United Fruit Co.,** (2d Cir., 1968) 402 F.2d 328.

His deposition was introduced into evidence and it was obvious that much of Petitioner's testimony was hearsay and incompetent as found by the Trial Court (Apdx A, p. 6a). Petitioner's desire for a continuance in the words of **King vs. United Benefit Fire Insurance Company** (10th Cir., 1967) 377 F.2d 728, 730, cert. denied 389 U.S. 857, that "he might come into court and make his defense and explain a few of the items that need to be explained in this case" under the circumstances was properly denied for essentially the same reasons no abuse was shown there.

The witness Bob Sacks of Jimmie Diesel Service is now, to the surprise of any counsel participating in the trial of this case, gratuitously and incorrectly characterized as a key expert witness. This is supplemented by the completely unreasonable and unsupported supposition that he could (1) present pertinent testimony relating to the adequacy of the engine work done by Respondent; (2)

establish the reasonableness of the Jimmie Diesel bill as an incurred expense; and (3) also thereby establish as unreasonable Respondent's charges for engine work.

Respondent's engine work in question was a part of Item 13, Job Order No. 499, which work and engines are the subject of the District Court's Memorandum of Decision (Apdx A, pp. 5a-6a).

1. The pure engine work by Respondent authorized by Petitioner did not extend to an overhaul, though recommended. The engines had been in bad shape for a long time before Respondent's work. One engine was seized before Jimmie Diesel saw it for repair. This was after Petitioner renegged on a previously agreed joint survey of the engines. The assertion of pertinent testimony is unsupported.

2. The reasonableness of the amount of Jimmie Diesel's bills is of no moment when the expense was not shown to be a responsibility of Respondent which accounts for Respondent's failure to seek out and serve the witness subsequent to July 25.

3. The amount of Jimmie Diesel's bill for overhauling one engine, or two for that matter, does not demonstrate unreasonableness of Respondents charges which included blower and heat exchange work as well. No showing was made under the circumstances for a continuance, the denial of which constituted an abuse of discretion, lack of due process, or grounds for new trial, e.g., **De Vargas vs. Brownell** (5th Cir., 1958) 251 F.2d 869.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Respondent's Brief in Opposition this 13 day of August, 1971 were mailed to George W. Liebmann and Peter H. Gunst, Attorneys for Petitioners, 1300 Mercantile Bank & Trust Building, 2 Hopkins Plaza, Baltimore, Maryland 21201, air mail postage prepaid, and all parties required to be served have been served.

RICHARD F. RALPH
Attorney for Respondent